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Nos. 13-354, 13-356

In the Supreme Court of the United States

KATHLEEN SEBELIUS, ET AL.,
Petitioners,

v.

HOBBY LOBBY STORES, INC., ET AL.,
Respondents.

CONESTOGA WOOD SPECIALTIES CORP., ET AL.,
Petitioners,

v.

KATHLEEN SEBELIUS, ET AL.,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Tenth and Third Circuits

BRIEF OF THOMAS MORE LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF HOBBY LOBBY AND CONESTOGA, ET AL.

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QUESTION PRESENTED

Whether the federal government can assume the power to require a private business and its owners, under threat of substantial fines, to purchase a product that violates their religious beliefs and furnish this product to their employees.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae* Thomas More Law Center respectfully submits this brief in support of Respondents in Case No. 13-354, Hobby Lobby Stores, Inc., Mardel, Inc., David Green, Barbara Green, Mart Green, Steve Green, Darsee Lett; and Petitioners in Case No. 13-356, Conestoga Wood Specialties Corp., Norman Hahn, Elizabeth Hahn, Norman Lemar Hahn, Anthony Hahn, and Kevin Hahn.[1]

Amicus Curiae Thomas More Law Center ("TMLC") is a national, public interest law firm that defends and promotes America's Christian heritage and moral values, including the religious freedom of Christians, time-honored family values, and the sanctity of human life. TMLC accomplishes its mission through litigation, education, and related activities.

SUMMARY OF ARGUMENT

The contraceptive-coverage Mandate of the Patient Protection and Affordable Care Act of 2010 (the "Mandate") is an unprecedented attack on religious liberty. This case is not about competing rights; there is only one right at issue here – the right to religious

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court. Pursuant to Court Rule 37.6, counsel for *Amicus Curiae* TMLC authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than TMLC, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

freedom. The employers who are fighting the Mandate are protected by the First Amendment and the Religious Freedom Restoration Act ("RFRA") from being forced, under threat of ruinous government fines, to fund products and services that violate their sincerely held religious beliefs. Conversely, there is no constitutional right to "free" contraception or abortion. The employers are not objecting to their employees' private decision to use these drugs, they are objecting to being forced by the government to pay for insurance plans that facilitate or contribute to these decisions. The employers object to being used to further a government objective that violates their sincerely held religious beliefs.

Through the Mandate, the government is unnecessarily denying religious business owners their livelihood for following the precepts of their faith. This is not the purpose of government, and it violates the constitutional protections put in place by the founders of this country. Exempting religiously objecting employers from the Mandate will not appreciably harm the government in pursuing its broadly stated goals of improving public health and gender equality.

ARGUMENT

The United States was founded upon a set of noble and workable principals that formed the basis for the Bill of Rights. Paramount was the recognition that for a citizenry to be truly free, they must be allowed to think, to speak, and to worship God without government interference or unjustified restriction. The Declaration of Independence was signed by mostly wealthy men who could have accepted their government's demands and continued living

comfortable lives. But these patriots recognized that to do so would have been to allow injustice to prosper. They risked their fortunes and their lives to create a country where people could be free to live and to worship consistent with their own conscience, and to provide for their families without unnecessary and crippling burdens created by an all-powerful government. The citizens currently before the Court challenging the Mandate can appreciate the struggles those early patriots faced. They too cannot allow injustice to prosper and are risking their fortunes and their livelihoods to defend the constitutional freedoms that define this country.

Congress, in discussing the need for the RFRA, recognized that

> [t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

H.R. Rep. No. 103-88, 103d Cong. 1st Sess., (1993) (quoting *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943)). Accordingly, the rights at issue in this case are not subject to the whims of politicians or the uneven tide of popular opinion. But although the free exercise of religion is an unalienable right that is protected in the First Amendment to the Constitution and in the RFRA, the ever expanding

federal government seeks to trample this right in pursuit of a political agenda.

The government claims it is necessary to coerce religiously objecting employers to provide insurance coverage for contraceptive and abortifacient products and services in order to promote the "compelling interests in public health and gender equality." Hobby Lobby Pet. Br. at 15. But the government fails to demonstrate how forcing Hobby Lobby Stores Inc., Mardel, Inc. Conestoga Wood Specialties Corp. and the families that own and operate these companies to provide contraceptive insurance coverage for their employees is necessary or the least restrictive means to achieve public health and gender equality. The government cannot justify its attempt to restrict the religious liberty of its citizens in pursuit of these broadly stated goals. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431-32 (2006) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963) & *Wisconsin v. Yoder*, 406 U.S. 205 (1972)).

The families and their businesses that are fighting this unjust law represent the American dream. Through hard work, and their faith in God and each other, these citizens have realized success. They have created jobs, provided goods and services to their communities, contributed to the economy, engaged in charitable works, and improved not only their own lives, but those of their employees and other citizens. Despite all this, the government seeks to intrude on their decision-making and to impose the will of unelected officials that contraceptive and abortion-inducing drugs be available "without cost sharing" to all women. The government demands that religiously-

objecting employers ignore fundamental tenets of their faith to provide insurance coverage for drugs and devices that have the ability to end a newly-formed human life. This substantial burden on religious freedom cannot be justified or tolerated under the RFRA or this Court's constitutional jurisprudence.

I. THE MANDATE DENIES FUNDAMENTAL RIGHTS

In discussing the need for the RFRA, Congress recognized "[m]any of the men and women who settled in this country fled tyranny abroad to practice peaceably their religion. The Nation they created was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." S. Rep. No. 103-111, 103d Cong., 1st Sess. (1993). The United States Constitution is based on the notion that each individual possesses inherent dignity and that as a result of this dignity, there are limits to what the government can do to, or demand from, its citizens. The Mandate ignores these limits, and demands that certain citizens suppress their own religious beliefs to purchase contraceptive insurance coverage for other citizens.

Religiously objecting employers are forced to choose between complying with federal law and violating their consciences, or disobeying the law and incurring substantial penalties. These employers simply wish to continue providing health insurance in compliance with their sincerely held religious beliefs, free of government interference.

A. The Mandate Creates a Substantial Burden on Religious Exercise

Regulations issued under the Affordable Care Act ("ACA") require all health insurance plans to provide coverage, without cost-sharing, for "preventative care," which the government has decided includes "all FDA-approved contraceptive methods and procedures." These drugs and services were included as "preventative care" under the ACA after the government directed the Institute of Medicine ("IOM") to compile a report with recommendations regarding what drugs and services should be covered as preventative care for women. The dissenting member of the IOM committee warned that "[t]he process set forth in the [Affordable Care Act] was unrealistic in the time allocated to such an important and time-sensitive undertaking" and that "[r]eaders of the Report should be clear on the fact that the recommendations were made without high quality systematic evidence of the preventative nature of the services considered" and that "evidence that the use of the services in question leads to lower rates of disability or disease and increased rates of well-being is generally absent." Inst. Of Med., Clinical Preventative Services for Women: Closing the Gaps 232 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 26, 2014). Rather than being a science-based review, the committee's review process "tended to result in a mix of advocacy" where the "process for evaluation of the evidence lacked transparency and was largely subject to the preferences of the committee's composition." *Id.*

Despite this warning, the government adopted the IOM recommendations. The approved contraceptive methods and procedures include abortion-inducing drugs and devices, which the employers before the Court object to providing or facilitating through their insurance plans because it is contrary to their sincerely held religious beliefs. *See* HRSA, Women's Preventative Services: Required Health Plan Coverage Guidelines, *available at* http://www.hrsa.gov/womensguidelines (last visited Jan. 23, 2014).

The religiously-objecting employers' operation of their health insurance plans according to their religious beliefs constitutes the exercise of religion under RFRA. The RFRA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). This includes not merely worship, but actions in accordance with one's faith. Through the Mandate, the government is forcing its citizens to either violate their conscience by providing coverage for abortifacient drugs and devices, or accept the demise of their livelihood because of crippling government fines. This is a substantial burden.

The government attempts to deny this burden exists by arguing that because the businesses are profit-seeking, they cannot exercise religion, and that the individual business owners are not harmed because it is only their business that is required to act and will be fined for non-compliance. Under this theory, the government can demand anything from a for-profit business, no matter how abhorrent or devastating those demands may be to the people that animate the business. But employers do not lose their free exercise

rights simply because they chose to arrange their business, which they run consistent with their faith, under the corporate form. And as the Tenth Circuit recognized in its review of this matter "Congress did not exclude for-profit corporations from RFRA's protections." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1129 (10th Cir. 2013); *see* 42 U.S.C. § 2000bb-3(b); *see also Conestoga Wood Specialties Corp. v. Secretary of the U.S. Dep't of Health & Human Servs.*, 724 F.3d 377 407-08 (3d Cir. 2013) (Jordan, J., dissenting).

The government submits that the individual employers before the Court do not have standing to challenge the Mandate because "[a]s owners, the Greens are distinct from the corporation. As managers, they have an additional, but equally distinct role. A manager takes actions on behalf of the corporation itself, not on behalf of himself as an individual." Hobby Lobby Pet. Br. at 29. This position ignores reality. An individual does not relinquish constitutional rights based on his or her employment position, nor is one absolved of responsibility for his or her actions, either spiritually or legally, simply because the actions were taken on behalf of someone else. Here, the employers before the Court believe that life begins from the moment of conception, and that it would be immoral for them to facilitate use of drugs and devices that end human life from this point forward. The government's Mandate necessarily requires them to do just that by purchasing employee health insurance that makes abortifacient drugs available to their employee's free of "cost-sharing" by the employee.

The government substantially burdens religious exercise by "putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981). This is exactly what the Mandate does by requiring religiously objecting employers to include abortifacient items in their healthcare plans and by imposing significant financial penalties if employers refuse. *See* 26 U.S.C. §§ 4980D(b)(1) & 4980H(c)(1).

RFRA strictly prohibits the federal government from substantially burdening a person's exercise of religion, "even if the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), except when the government can demonstrate "that application of the burden to the person–(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b); *O Centro Espirita*, 546 U.S. at 424. The government cannot establish either of these necessary elements.

B. The Mandate Does Not Further a Compelling Interest

To demonstrate that the substantial burden on the religiously objecting employers' religious liberties is justified, the government must "specifically identify an 'actual problem' in need of solving," and show that substantially burdening the objecting parties is "actually necessary to the solution." *Brown v. Entm't Merchs. Ass'n*, 131 S.Ct. 2729, 2738 (2011) (citations omitted). The government has the burden of proof and

"ambiguous proof will not suffice." *Id.* at 2739 (citation omitted).

The regulations at issue here allegedly "advance[] the compelling government interest in safeguarding public health and ensuring that women have equal access to health care." 78 Fed. Reg. 39,872 (July 2, 2013). The government submits that providing women with the abortifacient drugs at issue in this case, without requiring them to pay for it themselves, will advance this interest. The government's objective is to increase the use of abortifacient drugs and devices, which religiously objecting employers sincerely believe are harmful to women and destroy innocent life. The government fails to demonstrate that forcing objecting citizens to pay for insurance coverage for these abortifacients will further its stated goals.

The RFRA demands that the government do more than allege a general public interest that the objectionable regulations supposedly further. The "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita,* 546 U.S. at 430-31 (citing 42 U.S.C. § 2000bb-1(b). The government has not, and cannot, demonstrate that requiring religiously objecting employers to provide health insurance that makes abortifacient drugs and devices available to their employees "without cost sharing," would further the government's stated interest of "safeguarding public health," or "ensuring that women have equal access to health care." As the Seventh Circuit noted when addressing the Mandate's

application to religiously objecting employers, "[t]here are many ways to promote public and gender equality, almost all of them less burdensome on religious liberty." *Korte v. Sebelius*, 735 F.3d 654, 686 (7th Cir. 2013). The D.C. Circuit in *Gilardi v. United States Dep't of Health & Human Servs.*, noted that "'gender equality' is a bit of a misnomer" and that [m]ore accurately described, the interest at issue is resource parity–which, in the analogous abortion context, the Supreme Court has rejected as both a fundamental right and as an equal-protection issue." 733 F.3d 1208, 1221 (D.C. Cir. 2013) (citing *Harris v. McRae*, 448 U.S. 297, 317-18 (1980) ("Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.")). In sum, the employees who the Mandate supposedly benefits, do not have a constitutional right to "free" birth control or abortion. *See Harris*, 448 U.S. at 316 ("regardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices."). And the government cannot invent a right to "free" contraception or abortifacients by forcing employers to surrender their constitutionally and statutorily protected right to religious freedom to purchase employee insurance coverage for these products.

II. THE MANDATE CANNOT BE JUSTIFIED UNDER EXISTING CASE LAW

The Court has previously recognized that "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society. It presents extraordinarily difficult questions that . . . involve 'virtually irreconcilably points of view.'" *Stenberg v. Carhart*, 530 U.S. 914, 947 (2000) (O'Connor. J., concurring). Yet, rather than respect the rights of citizens to form their own view on this issue, and to act according to their conscience, the government, via the Mandate, is forcing one viewpoint on religiously objecting Americans.

Citizens who believe that life begins at conception are being forced to use their companies and resources to provide insurance coverage for drugs and devices that will end life after this critical point. The government's statement that federal law defines pregnancy as beginning at implantation and does not classify the drugs at issue as "abortion-causing" is irrelevant. Hobby Lobby Pet. Br. 10. The employers sincerely believe that life begins at conception, and should be protected from this point forward, and the government cannot show that this belief is irrational or not entitled to deference. "Government may neither compel affirmation of a repugnant belief, nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, nor employ the taxing power to inhibit the dissemination of particular religious views." *Sherbert*, 374 U.S. at 402 (internal citations omitted).

The government's objective is to increase the use of contraceptive and abortifacient drugs and devices,

which the religiously objecting employers challenging the Mandate sincerely believe are harmful to women and destroy innocent human life. The government lacks any constitutional authority to pursue this objective by commandeering the resources of private businesses and compelling those businesses and their owners, under threat of ruinous fines, to pay for coverage of abortifacient drugs for their employees. The objections of hard-working, entrepreneurial, religious Americans to being used in this way cannot be ignored without doing violence to this country's entire concept of justice. The government cannot force one of its citizens to violate the commands of their faith simply because doing so will arguably make an aspect of someone else's life easier.

If the Mandate is allowed to survive this Court's review, then the right to abortion and contraception that the Court has previously recognized is no longer based on a right to privacy and to freedom from governmental interference in individual decisions. Cases dealing with abortion and contraception have, until now, primarily focused on what the government can and cannot prevent a woman from doing to her body or to her unborn child. *See e.g. Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007). Conversely, the Court is now asked to decide whether the federal government can command action from private individuals, who want nothing to do with a woman's choice to end her pregnancy, to facilitate this decision by ensuring that drugs and devices that will end newly-conceived life are covered by their employee

insurance plans and are presented to the woman free of charge.

The Court has previously stated "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, conception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851 (citing *Carey v. Population Services International*, 431 U.S. 678, 685 (1977)). If our laws protect the right to use, purchase, and facilitate contraception and abortion, they must also protect the right not to. It seems obvious that the government cannot force its citizens to use contraception or abortifacients, similarly obvious should be that the government cannot force its citizens to furnish these things to others.

In finding that a state could not prohibit individuals' use of contraception, Justice Goldberg recognized:

> [t]he makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone – the most comprehensive of rights and the most valued by civilized men.

Griswold, 381 U.S. at 494 (Goldberg, J., concurring) (quoting *Olmstead v. United States*, 277 U.S. 438, 478

(1928) (Brandeis, J., dissenting)). The right to be let alone – to be free of the government's unreasonable demands that they forfeit their religious freedom due to the means they have chosen to earn a living – is all that the employers in the matter before the Court are seeking.

These religiously-objecting employers cannot pay for, or otherwise facilitate, the use of life-ending drugs and devices without forsaking the dictates of their faith. Thus, the government is forcing individuals and families to either use the companies that they have built and run consistent with their religious beliefs, to fund drugs and devices that violate tenets of their faith, or to watch as their companies, and all the jobs those companies provide, are destroyed by crippling fines. The government may not command such an impossible choice. *See Sherbert,* 374 U.S. at 404.

The Court stated in *Planned Parenthood v. Casey*:

> [m]en and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage. . . . It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon a protected liberty.

Casey, 505 U.S. at 850-51 (internal citations omitted). The Mandate intrudes upon objecting employers' protected religious liberty. Conversely, the employees' right to use the drugs and devices at issue is not in

jeopardy simply because their employer does not agree to provide insurance covering these things.

The Mandate requires religiously objecting employers such as Hobby Lobby, Inc., Mardel, Inc., the Green family, Conestoga Wood Specialties Corp., and the Hahn Family to choose – they can follow their conscience and accept financial ruin, or they can obey the government and risk eternal consequences. These citizens must not be forced to sacrifice their faith in exchange for their right to earn a living in this country. The Constitution and the RFRA protect Americans from such a dramatically unjust abuse of government power.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Tenth Circuit and reverse the decision of the Third Circuit.

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